



# TECHNICAL RELEASE

TAXGUIDE 01/15 (TECH 02/15TAX)

**UPDATE:** Please note that this guidance will be superseded by TAXGUIDE 11/16 which was published on 1 November 2016 and will come into effect on 1 March 2017.

Download the updated PCRT at [icaew.com/pcrt](http://icaew.com/pcrt).

## PROFESSIONAL CONDUCT IN RELATION TO TAXATION

Guidance published on 1 May 2015 by ICAEW jointly with AAT, ACCA, ATT, CIOT, ICAS and STEP

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## PROFESSIONAL CONDUCT IN RELATION TO TAXATION

### FOREWORD

This guidance is effective from 1 May 2015 and is part of ICAEW Regulations, Standards and Guidance [icaew.com/regulations](http://icaew.com/regulations). It updates the guidance published in February 2014. It has been reviewed by Counsel.

It has been prepared by ICAEW with the Association of Accounting Technicians, Association of Certified Chartered Accountants, Association of Taxation Technicians, Chartered Institute of Taxation, Institute of Chartered Accountants of Scotland, and Society of Trust and Estate Practitioners.

ICAEW provides other practice support for members by way of, inter alia, TAXGUIDEs and TAXtools, TAXline and TAXline Tax Practices and TAXline Tax Planning, online webinars and TAXtalks, ICAEW Advisory practice and ethics helpsheets and technical and ethics inquiry lines, the Library, and Support Members (see [icaew.com](http://icaew.com)).

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# PROFESSIONAL CONDUCT IN RELATION TO TAXATION

## PART I INTRODUCTION AND THE FUNDAMENTAL PRINCIPLES

### 1. INTRODUCTION

#### Context

Tax advisers operate in a complex business and financial environment. The increasing public focus on the role of taxation in wider society means a greater interest in the actions of tax advisers and their clients.

This guidance, written by the professional bodies for their members working in tax, sets out the hallmarks of a good tax adviser, and in particular the fundamental principles of behaviour that members are expected to follow:

A good tax adviser:

- Holds a recognised professional qualification requiring expertise in tax to be demonstrated;
- Is a member of a recognised professional body with standards and a regulatory regime, including a code of conduct and ethics;
- Holds professional indemnity insurance for client protection; and
- Is obliged to follow, and follows, the principles of behaviour detailed in this guidance.

The guidance has been recognised in the courts<sup>1</sup> as ‘setting the standard’ for use by all tax advisers in the UK. The contributing professional bodies welcome its adoption on a voluntary basis by all tax advisers who are not their members.

This guidance aims to make clear any tax adviser’s obligation to advise their clients or businesses accurately and thoroughly of the implications of their actions, including reputational and practical aspects. It also addresses common, as well as more complex and difficult, situations with expert commentary in an ever-changing environment.

The guidance includes further commentary to reflect the ongoing developments and the public concern about aggressive tax avoidance and evasion. This update does not include any specific changes following the paper published by HM Treasury and HMRC on 19 March 2015 [Tackling tax evasion and avoidance](#). This paper asks

*“ the regulatory bodies who police professional standards to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance”*

Once a new government is in place the professional bodies will hold further discussions with HM Treasury and HMRC about how this challenge should be progressed. This guidance is being issued in the meantime as it contains extensive new material of practical benefit to members.

HMRC’s [Your Charter](#) sets out taxpayers’ rights and obligations and covers the level of service a taxpayer can reasonably expect from HMRC. HMRC is also bound by the [Civil Service Code](#) and [Building our future: Transforming the way HMRC serves the UK](#).

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<sup>1</sup> By the Court of Appeal in *Hossein Mehjoo v Harben Barker*, [2014] 4 All ER 806.

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2014/358.html&query=mehjoo&method=boolean>

## Scope

- 1.1 The purpose of Professional Conduct in Relation to Taxation is to assist and advise members on their professional conduct in relation to taxation, and particularly in the tripartite relationship between a member, client and HMRC.
- 1.2 Part 1 explains the fundamental principles which govern the conduct of members.
- 1.3 Part 2 applies these principles to the day to day work of a tax adviser.
- 1.4 Part 3 applies the principles to more specialist situations.
- 1.5 The issues addressed in Chapters 3 – 11 are not intended to be, nor should they be interpreted as, an exhaustive list of all circumstances experienced by a member which may pose threats to compliance with the fundamental principles. Consequently, it is not sufficient for a member merely to comply with the examples presented; rather he must consider and observe the fundamental principles across all his professional activities.
- 1.6 This guidance includes practical advice. If in doubt about the ethical or legal considerations of a particular case, a member should seek advice from his professional body and, where appropriate, his legal advisers. The professional bodies take no responsibility for failure to seek advice where appropriate.
- 1.7 A member must at all times fulfil his obligations under the anti-money laundering legislation. Anti-money laundering issues are not covered in detail in this guidance; the member is instead referred to the Treasury approved [CCAB Anti-Money Laundering guidance for the Tax and Accountancy sector](#) (which includes an Appendix for the Tax Practitioner) A member working outside the tax and accountancy sector should refer to the relevant guidance for their sector or take advice as appropriate.

## Status

- 1.8 The guidance has been prepared jointly by the:
  - Association of Accounting Technicians
  - Association of Chartered Certified Accountants
  - Association of Taxation Technicians
  - Chartered Institute of Taxation
  - Institute of Chartered Accountants in England and Wales
  - Institute of Chartered Accountants of Scotland
  - Society of Trust and Estate Practitioners
- 1.9 The guidance supersedes all previous editions and is based on the law as at 18 November 2016. A member should verify and satisfy himself that there have been no subsequent changes which impact on how this guidance applies to his particular facts and circumstances.
  - a. While every care has been taken in the preparation of this guidance the ICAEW and all those involved in the preparation and approval of this guidance do not undertake a duty of care or otherwise for any loss or damage occasioned by reliance on this guidance. Practical guidance cannot and should not be taken to substitute appropriate legal advice.

## Application to all members

- 1.11 Whilst the content of this guidance is primarily applicable to members in professional practice, the principles apply to all members who practise in tax including:



- Employees attending to the tax affairs of their employer or of a client; and
- Those dealing with the tax affairs of themselves or others such as family, friends, charities etc whether or not for payment; and
- Those working in HMRC or other public sector bodies or government departments.

1.12 Where a member's employer is not prepared to follow the ethical approach set out in this guidance (despite the member's reasonable attempts to persuade him to do so) the member may contact his professional body and/or seek legal advice. Further advice can be found at [icaew.com/regulations](http://icaew.com/regulations), via ICAEW Ethics Enquiry Line on 01908 248025 and [ethics@icaew.com](mailto:ethics@icaew.com), and from the Support Members Scheme 0800 917 3526 and [support.members@icaew.com](mailto:support.members@icaew.com)

1.13 A member who, for example, is based overseas or who is acting for a client who is subject to the tax jurisdiction of another country could be subject to different legal obligations under the tax law and general law of that country. Subject to that caveat, a member must apply the principles set out in this guidance to professional activities with non UK aspects. The principles will also apply to dealings with other tax authorities such as Revenue Scotland which has taken over certain devolved taxes in Scotland from 1 April 2015 and to any other new tax authorities established should tax be devolved to other jurisdictions within the UK.

### **Interpretation**

1.14 In this guidance

- 'Client' includes, where the context requires, 'former client'
- 'Member' (and 'members') includes 'firm' or 'practice' and the staff thereof
- For simplicity 'he/his is used throughout but should be taken to include she/her
- Words in the singular include the plural and words in the plural include the singular

### **Abbreviations**

1.15 The following abbreviations have been used:

CCAB	Consultative Committee of Accountancy Bodies
DOTAS	Disclosure of Tax Avoidance Schemes
GAAR	General Anti-Abuse Rule in Finance Act 2013
HMRC	HM Revenue and Customs
MLRO	Money Laundering Reporting Officer
NCA	National Crime Agency (previously the Serious Organised Crime Agency 'SOCA')
POTAS	Promoters of Tax Avoidance Schemes
SRN	Scheme Reference Number

## PART I THE FUNDAMENTAL PRINCIPLES

### 2. THE FUNDAMENTAL PRINCIPLES

#### Overview of the fundamental principles

- 2.1 Ethical behaviour in the tax profession is critical. The work carried out by a member needs to be trusted by society at large as well as by clients and other stakeholders. What a member does reflects not just on themselves but on the profession as a whole.
- 2.2 A member must comply with the following fundamental principles<sup>2</sup>:

- **Integrity**

To be straightforward and honest in all professional and business relationships.

- **Objectivity**

To not allow bias, conflict of interest or undue influence of others to override professional or business judgements.

- **Professional competence and due care**

To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.

- **Confidentiality**

To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the member or third parties.

- **Professional behaviour**

To comply with relevant laws and regulations and avoid any action that discredits the profession.

Each of these fundamental principles is discussed in more detail below in the context of taxation services.

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<sup>2</sup> The Fundamental Principles are derived from the Code of Ethics for Professional Accountants issued by the [International Ethics Standards Board of Accountants' \(IESBA\)](#) in July 2009.

## **Integrity**

- 2.3 A member must act honestly in all his dealings with his clients, all tax authorities and other interested parties, and do nothing knowingly or carelessly that might mislead either by commission or omission.

## **Objectivity**

- 2.4 A member may be exposed to situations that could impair his objectivity. It is impracticable to define and prescribe all such situations. Relationships which bias or unduly influence the professional judgement of the member must be avoided.
- 2.5 A member must explain to his client the material risks of the tax planning or tax positions and the basis on which the advice is given.
- 2.6 A member must always disclose to his client if he is receiving commission, incentives or any other advantage and the amounts he receives from a third party relating to the matter upon which he is advising his client. He must also follow his professional body's rules on disclosure of and accounting for commission.

## **Professional competence and due care**

- 2.7 A member has a professional duty to carry out his work within the scope of his engagement and with the requisite skill and care. A member should take care not to stray beyond the agreed terms of the engagement; if he does exceed the scope he should agree revised terms with his client and check that his professional indemnity insurance covers the enhanced work.
- 2.8 A member is free to choose whether or not to act for a client both generally and as regards specific activities. However where a member chooses to limit or amend the scope of services he provides to a client he should make this clear in writing.
- 2.9 When advising a client a member has a duty to serve that client's interests within the relevant legal and regulatory framework.
- 2.10 A member must carry out his work with a proper regard for the technical and professional standards expected. In particular, a member must not undertake professional work which he is not competent to perform unless he obtains appropriate assistance from a suitably qualified specialist.
- 2.11 A member who is giving what he believes to be a significant opinion to a client should consider obtaining a second opinion to support the advice. Where the second opinion is to be obtained externally, due regard must be had to client confidentiality.
- 2.12 Advice should be given in the context of the commercial and other non-tax objectives and the facts and circumstances of the client.
- 2.13 On occasions there may be more than one tenable interpretation of the law. Each case should be considered on its own individual facts and circumstances.

## **Confidentiality**

- 2.14 Confidentiality is a professional principle and is also a legally enforceable contractual obligation. It may be an express term of the engagement letter between the member and the client. Where it is not an express term, a court would in most circumstances treat confidentiality as an implied contractual term.

- 2.15 A member may only disclose information without his client's consent when there is an express legal or professional right or duty to disclose.
- 2.16 The duty of confidentiality is rigorously safeguarded by the courts. Disclosure of confidential material in a member's own interest must be made only where it is considered adequate, relevant and reasonably necessary for the administration of justice - in other words, when a member considers that it would otherwise impair the pursuit of his legitimate interests and rights if he was prevented from disclosing the information in all the circumstances. Only the minimum amount of information necessary to protect those interests may be disclosed. Examples of such circumstances may include, but are not limited to, the following:
- To enable a member to defend himself against a criminal charge or to clear himself of suspicion;
  - To enable a member to defend himself in disciplinary proceedings;
  - To resist proceedings for a penalty, or civil or criminal proceedings in respect of a taxation offence, for example in a case where it is suggested that a member knowingly engaged in dishonest conduct with a view to bringing about a loss of tax revenue;
  - To resist a legal action made against him by a client or third party;
  - To enable a member to sue for unpaid fees;
  - To enable a member to sue for defamation.
- 2.17 If there is any doubt that the circumstances in 2.16 would apply, or there is the risk of challenge by a client or employer, a member is strongly recommended to seek legal advice. See also Chapter 5.
- 2.18 The anti-money laundering regime provides a statutory code to determine when a disclosure must be made to NCA. While this is a mandatory regime, it also gives a structure for the assessment of the public interest in a tax context, including which of the following should take precedence, in a particular set of circumstances:
- The public interest in reporting knowledge or suspicions of criminal activity to the authorities; or
  - The public interest in clients receiving advice in confidence.
- A member should follow the Treasury approved [CCAB guidance](#) and in particular Chapters 6 on 'Internal Reporting' and 7 on 'Role of MLRO and SAR reporting'.

### **Professional behaviour**

- 2.19 A member must always act in a way that will not bring him or his professional body into disrepute.
- 2.20 A member must behave with courtesy and consideration towards all with whom he comes into contact in a professional capacity.
- 2.21 A member must comply with all relevant legal and regulatory obligations when dealing with a client's tax affairs and assist his clients to do the same. A member who has reason to believe that proposed arrangements are, or may be, tax evasion must strongly advise clients not to enter into them. If a client chooses to ignore that advice, it is difficult to envisage situations where it would be appropriate for a member to continue to act other than in rectifying the client's affairs.

- 2.22 Serving the interests of his clients will, on occasion, bring a member into disagreement or conflict with HMRC. A member should manage such disagreements or conflicts in an open, constructive and professional manner. However, a member should serve his clients' interests as robustly as circumstances warrant whilst applying these principles.
- 2.23 A member should consider whether any tax arrangements with which he might be associated on his own behalf or on behalf of a client might bring the member and the profession into disrepute and take action as necessary. The member should consider carefully the appropriateness of the arrangements in question (see Chapter 4 for more detail).
- 2.24 A member's own tax affairs should be kept up to date. Neglect of a member's own affairs could raise doubts within HMRC as to the standard of the member's professional work and could bring him or his professional body into disrepute.
- 2.25 A member should ensure that his internal and external communications including those using social media are consistent with the principles in this guidance and in particular confidentiality. See also [Para 140 of Code of Ethics A](#)

**PART 2 GENERAL GUIDANCE****3. TAX RETURNS****Definition of tax return (return)**

3.1 For the purposes of this Chapter, the term 'return' includes any document or online submission of data that is prepared on behalf of the client for the purposes of disclosing to any taxing authority details that are to be used in the calculation of tax due by a client or a refund of tax due to the client or for other official purposes and, for example, includes:

- Self-assessment returns for income or corporation tax;
- VAT and Customs returns;
- PAYE returns;
- Inheritance tax returns;
- Returns or claims in respect of any other tax or duties where paid to the UK Government or any authority, such as a devolved government.

3.2 A letter giving details in respect of a return or as an amendment to a return including, for example, any voluntary disclosure of an error should be dealt with as if it was a return.

**Responsibilities**Taxpayer's responsibility

3.3 The taxpayer has primary responsibility to submit correct and complete returns to the best of his knowledge and belief. The return may include reasonable estimates where necessary. It follows that the final decision as to whether to disclose any issue is that of the client.

Member's responsibility

3.4 A member who prepares a return on behalf of a client is responsible to the client for the accuracy of the return based on the information provided.

3.5 In dealing with HMRC in relation to a client's tax affairs a member must bear in mind his duty of confidentiality to the client and that he is acting as the agent of his client. He has a duty to act in the best interests of his client.

3.6 A member must act in good faith in dealings with HMRC in accordance with the fundamental principle of integrity. In particular the member must take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client. Where acting as a tax agent, a member is not required to audit the figures in the books and records provided or verify information provided by a client or by a third party. A member should take care not to be associated with the presentation of facts he knows or believes to be incorrect or misleading nor to assert tax positions in a tax return which he considers have no sustainable basis.

3.7 When a member is communicating with HMRC, he should consider whether he needs to make it clear to what extent he is relying on information which has been supplied by the client or a third party.

## **Materiality**

- 3.8 Whether an amount is to be regarded as material depends upon the facts and circumstances of each case.
- 3.9 The profits of a trade, profession, vocation or property business must be computed in accordance with Generally Accepted Accounting Principles (GAAP) subject to any adjustment required or authorised by law in computing profits for those purposes. This permits a trade, profession, vocation or property business to disregard non-material adjustments in computing its accounting profits. However, it should be noted that for certain small businesses an election may be made to use the cash basis instead.
- 3.10 The application of GAAP, and therefore materiality, does not extend beyond the accounting profits. Thus the accounting concept of materiality cannot be applied when completing tax returns (direct and indirect), for example when:
- Computing adjustments required to accounting figures so as to arrive at taxable profits;
  - Allocating income, expenses and outgoings across the relevant boxes on a self-assessment tax return;
  - Collating the aggregate figures from all shareholdings and bank accounts for disclosure on tax returns.

## **Disclosure**

- 3.11 If a client is unwilling to include in a tax return the minimum information required by law, the member should follow the guidance in Chapter 5 Irregularities. 3.12 - 3.18 below give guidance on some of the more common areas of uncertainty over disclosure.
- 3.12 In general, it is likely to be in a client's own interests to ensure that factors relevant to his tax liability are adequately disclosed to HMRC because:
- His relationship with HMRC is more likely to be on a satisfactory footing if he can demonstrate good faith in his dealings with them; and
  - He will reduce the risk of a discovery or further assessment and may reduce exposure to interest and penalties.
- 3.13 It may be advisable to consider fuller disclosure than is strictly necessary. The factors involved in making this decision include:
- The terms of the applicable law;
  - The view taken by the member;
  - The extent of any doubt that exists;
  - The manner in which disclosure is to be made; and
  - The size and gravity of the item in question.
- 3.14 When advocating fuller disclosure than is strictly necessary a member should ensure that his client is adequately aware of the issues involved and their potential implications. Fuller disclosure should not be made unless the client consents to the level of disclosure.
- 3.15 Cases will arise where there is doubt as to the correct treatment of an item of income or expenditure, or the computation of a gain or allowance. In such cases a member ought to consider carefully what disclosure, if any, might be necessary. For example, additional disclosure should be considered where:

- A return relies on a valuation;
- There is inherent doubt as to the correct treatment of an item, for example, expenditure on repairs which might be regarded as capital in whole or part, or the VAT liability of a particular transaction; or
- HMRC has published its interpretation or has indicated its practice on a point, but the client proposes to adopt a different view, whether or not supported by Counsel's opinion. The member should refer to the guidance on the *Veltema*<sup>3</sup> case and 3.19 below. See also HMRC guidance<sup>4</sup>.

3.16 A member who is uncertain whether his client should disclose a particular item or of its treatment should consider taking further advice before reaching a decision. He should use his best endeavours to ensure that the client understands the issues, implications and the proposed course of action. Such a decision may have to be justified at a later date, so the member's files should contain sufficient evidence to support the position taken, including contemporaneous notes of discussions with the client and/or with other advisers, copies of any second opinion obtained and the client's final decision. A failure to take reasonable care may result in HMRC imposing a penalty if an error is identified after an enquiry.

3.17 The 2012 case of *Charlton*<sup>5</sup> clarified the law on discovery in relation to tax schemes disclosed to HMRC under DOTAS. The Upper Tribunal made clear that where the taxpayer has:

- a. Disclosed details of a significant allowable loss claim;
- b. Declared relatively modest income/ gains; and/ or
- c. Included the SRN issued by HMRC on the appropriate self-assessment tax return,

an HMRC officer of reasonable knowledge and skill would be expected to infer that the taxpayer had entered into a tax avoidance scheme (and that fuller details of such scheme would be contained in the relevant AAG1 Form). As a result, HMRC would be precluded, in most cases, from raising a discovery assessment in a situation where the client implemented the disclosed scheme and HMRC failed to open an enquiry within the required time.

3.18 It is essential where a member is involved in the preparation of a self-assessment tax return which includes a scheme disclosed under DOTAS that the member takes care to ensure:

- That the tax return provides sufficient details of any transactions entered into (in case the AAG1 Form is incomplete);
- That the SRN is recorded properly in the appropriate box included for this purpose on a self- assessment tax return; and
- The SRN is shown for the self-assessment return for each year in which the scheme is expected to give the client a tax advantage.

#### Supporting documents

3.19 For the most part, HMRC does not consider that it is necessary for a taxpayer to provide supporting documentation in order to satisfy the taxpayer's overriding need to make a correct return. HMRC's view is that, where it is necessary for that purpose, explanatory information should be entered in the 'white space' provided on the return. However, HMRC does recognise that the taxpayer may wish to supply further details of a particular

<sup>3</sup> *Langham v Veltema* [2004] STC 544 (CA), 76 TC 259.

<sup>4</sup> <https://www.gov.uk/government/publications/statement-of-practice-1-2006>

<sup>5</sup> *Charlton and others v HMRC* [2013] STC 866.



computation or transaction in order to minimise the risk of a discovery assessment being raised at a later time. Following the uncertainty created by the decision in *Veltema*, HMRC's guidance can be found in SP1/06 - Self Assessment: Finality and Discovery<sup>6</sup>.

- 3.20 Further HMRC guidance<sup>7</sup> says that sending attachments with a tax return is intended for those cases where the taxpayer 'feels it is crucial to provide additional information to support the return but for some reason cannot utilise the white space'.

### **Reliance on HMRC published guidance**

- 3.21 Whilst it is reasonable in most circumstances to rely on HMRC published guidance, a member should be aware that the Tribunal and the courts will apply the law even if this conflicts with HMRC guidance.
- 3.22 Notwithstanding this, if a client has relied on HMRC guidance which is clear and unequivocal and HMRC resiles from any of the terms of the guidance, a Judicial Review claim is a possible route to pursue.

### **The GAAR**

- 3.23 The GAAR applies on a self-assessment basis. A member should consider whether the GAAR could apply when completing a tax return. Application of the GAAR is difficult and if the position is not clear then the client should be advised that specialist assistance or a second opinion is necessary. See also 4.17 – 4.26.
- 3.24 Where it is uncertain whether the GAAR applies the member should consider recommending additional and appropriate disclosure. Where the client disagrees the member should clearly record his advice and consider whether he can act as agent. See Chapter 5.
- 3.25 These principles also apply when considering the General Anti- Avoidance Rule under the Revenue Scotland and Tax Powers Act 2014.

### **Approval of tax returns**

- 3.26 It is essential that the member advises the client to review his tax return before it is submitted.
- 3.27 The member should draw the client's attention to the responsibility which the client is taking in approving the return as correct and complete. Attention should be drawn to any judgemental areas or positions reflected in the return to ensure that the client is aware of these and their implications before he approves the return.
- 3.28 A member should obtain evidence of the client's approval of the return in electronic or non-electronic form.

### **Exceptions**

- 3.29 Where a return is not reviewed by the client before submission, then, because of the risk to the adviser, the terms of the engagement should make clear that returns are completed on the basis of the information provided by the client and the client is no less responsible for errors in returns which have been prepared on the basis of that information than if he had approved and signed the returns personally.

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<sup>6</sup> [Statement of Practice 1 \(2006\) - Publications - GOV.UK](#)

<sup>7</sup> <http://www.hmrc.gov.uk/manuals/sammanual/sam126040.htm>

### Signing tax returns

- 3.30 A member may sign tax returns in his capacity as liquidator, receiver or administrator or under a personal appointment as trustee, executor, attorney or director.
- 3.31 If a member is signing a tax return on behalf of a client, he should carefully consider:
- His legal authority to do so (for example, is a power of attorney required?);
  - The process whereby the client will review and take responsibility for the contents of the return; and
  - Any legal implications of signing the return for both the practice and the individual signatory.
- 3.32 One specific scenario in which these principles may be relevant is where a member is appointed as tax agent or tax representative for VAT purposes. Such appointments are principally relevant where the client is a 'non established taxable person' (NETP). Where a member is appointed as an agent, the client remains legally responsible for registering for VAT, submitting returns and paying VAT on time. Any arrangement made with an agent to look after a client's VAT affairs will be subject to the particular contractual agreement between the parties.
- 3.33 Appointment as tax representative for VAT for a NETP means that the member becomes jointly and severally liable for his client's VAT debts. The responsibilities of a VAT representative are specified in Section 48 of the VAT Act 1994 and a member should consider carefully whether he is prepared to take on such responsibilities. As an alternative, the member should consider whether appointment simply as a tax agent for VAT is preferable, as this does not make him jointly and severally liable for his client's VAT debts.
- 3.34 If the member does decide to accept an appointment as tax representative for VAT purposes, he should consider ways of protecting his practice from the implications of joint and several liability. The risk can be mitigated, for example, by obtaining bank guarantees from the client. The member should also be aware of the possibility that his objectivity could be threatened due to the self-interest arising from his role as the client's VAT representative.

### Electronic filing of tax returns

- 3.35 Tax administration systems, including the UK's, are increasingly moving to mandatory electronic filing of tax returns.
- 3.36 Ideally a member will explicitly file in his capacity as agent. In some cases HMRC will issue a pin code to the client for the agent to use. A member is advised to use the facilities provided for agents and to avoid knowing or using the client's personal access credentials wherever possible.
- 3.37 A member should keep his access credentials safe from unauthorised use and consider periodic change of passwords. Other useful information can be found at <http://www.getsafeonline.co.uk/> and at
- <http://www.hmrc.gov.uk/security/advice.htm> for HMRC's online security advice.
  - <https://www.gov.uk/government/news/gone-phishing-75000-fake-tax-refund-emails-reported> for further details.
  - <http://www.hmrc.gov.uk/security/examples.htm> for examples of phishing emails online

A member is recommended to forward suspicious emails to HMRC at [phishing@hmrc.gsi.gov.uk](mailto:phishing@hmrc.gsi.gov.uk) and then delete them. It is also important to avoid clicking on websites or links in suspicious emails, or opening attachments.

- 3.38 A member should consider carefully the terms which he agrees with the tax authority in order to use electronic filing. These may, for example, include provisions around the security of access credentials or different deadlines.
- 3.39 A member will need to consider whether the process of electronic filing creates any different obligations for him from paper filing.
- 3.40 If electronic filing causes a member to become involved in the payment or repayment of tax, the member should ensure he fully understands his role and responsibilities.
- 3.41 A member should ensure that his role and responsibilities and those of his client in relation to the electronic filing process are clearly set out and understood by the client. This is ideally achieved through the engagement letter.
- 3.42 Electronic filing systems are constantly evolving and a member should ensure his procedures are updated as and when appropriate.

## 4. TAX ADVICE

### Introduction

- 4.1 Giving tax advice covers a variety of activities. It can involve advising a client on a choice afforded to him by legislation, for example, whether to establish a business as a sole trader, partnership or company. It could be advising on the tax implications of buying or selling an asset or business, or advising on succession planning.
- 4.2 For the most part clients are seeking advice on how to structure their affairs, either personal or commercial, in a way that is tax efficient and ensures that they comply with their legal and regulatory requirements. Transactions based on advice which are centred around non-tax objectives are less likely to attract scrutiny or criticism from stakeholders and are much more likely to withstand challenge by HMRC.
- 4.3 Tax planning is legal and taxpayers are entitled to enter into transactions that reduce tax or to take interpretations of legislation that HMRC may not agree with. If HMRC wishes to challenge a particular transaction or interpretation, it may amend the return or issue an assessment accordingly. The client may then appeal against HMRC's decision through the tax tribunal and courts if necessary with the associated costs and disruption. Ultimately only the courts can determine whether a particular piece of tax planning is legally effective or not. However a member should always advise the client that there may be wider reputational issues in such circumstances.
- 4.4 Some tax strategies have been the subject of heated public debate, raising ethical challenges. Involvement in certain arrangements could subject the client and the member to significantly greater compliance requirements, scrutiny or investigation as well as criticism from the media, government and other stakeholders and difficulties in obtaining professional indemnity insurance cover.
- 4.5 The definition of 'avoidance' is an evolving area that can depend on the tax legislation, the intention of Parliament, interpretations in case law and the varying perceptions of different stakeholders and is discussed further below.
- 4.6 A member should consider the contents of this Chapter carefully when giving tax advice and the potential negative impact of his actions on the public perception of the integrity of the tax profession more generally.
- 4.7 Clearly a member must never be knowingly involved in tax evasion, although, of course, it is appropriate to act for a client who is rectifying their affairs.

### Tax planning vs tax avoidance?

- 4.8 Despite attempts by courts over the years to elucidate tax 'avoidance' and to distinguish this from acceptable tax planning or mitigation, there is no widely accepted definition.
- 4.9 Publicly, the term 'avoidance' is used in the context of a wide range of activities, be it multinational structuring or entering contrived tax-motivated schemes. The application of one word to a range of activities and behaviours oversimplifies the concept and has led to confusion.
- 4.10 In a 2012 paper on tax avoidance, the Oxford University Centre for Business Taxation states that transactions generally do not fall into clear categories of tax avoidance, mitigation or planning. Similarly, it is often not clear whether something is acceptable or unacceptable. Instead the paper concludes that there is '*a continuum from transactions*

*that would not be effective to save tax under the law as it stands at present to tax planning that would be accepted by revenue authorities and courts without question.*<sup>8</sup>

### **What is HMRC's view?**

- 4.11 If any challenge to arrangements is to be received it will most likely be from HMRC and therefore it is important to understand HMRC's view of avoidance.<sup>9</sup>
- 4.12 In March 2015 HMRC issued 'Tackling tax evasion and avoidance'<sup>10</sup>. In this document HMRC provides its view on the question of 'What is tax avoidance?'

'Tax avoidance involves bending the rules of the tax system to gain a tax advantage that Parliament never intended. It often involves contrived, artificial transactions that serve little or no purpose other than to produce this advantage. It involves operating within the letter – but not the spirit – of the law'.

'Tax planning involves using tax reliefs for the purpose for which they were intended, for example, claiming tax relief on capital investment, or saving via ISAs or for retirement by making contributions to a pension scheme. However, tax reliefs can be used excessively or aggressively, by others than those intended to benefit from them or in ways that clearly go beyond the intention of Parliament'.

- 4.13 Part of HMRC's website 'Tempted by Tax Avoidance'<sup>11</sup> sets out, inter alia, what HMRC views as typical characteristics of a tax avoidance scheme that taxpayers and their advisers should be wary of. These characteristics have the following broad features:
- If it sounds too good to be true it probably is.
  - Tax results out of proportion with commercial or economic risk or activity.
  - Over complexity, artificial or contrived steps, or circular money flow.
  - Offshore entities or tax haven countries are involved for no good reason.
  - Secrecy or confidentiality agreements.
  - The arrangement has a SRN assigned under the Disclosure of Tax Avoidance Scheme Rules (DOTAS).
- 4.14 It should be noted that the existence of one or more of these features does not necessarily mean the transaction is 'tax avoidance'. Some of these features may exist in straightforward commercial transactions. For example, a transaction which has been allocated a SRN can be inoffensive but still be disclosable because it falls within a prescriptive area of the DOTAS regime such as leasing transactions, or transactions involving Stamp Duty Land Tax.
- 4.15 Whilst the aforementioned lists are not determinative or exhaustive in identifying planning that might be viewed as 'avoidance' they are nevertheless a useful sense check for members. Where one or more of these features are present this increases the risk of the

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[https://www.sbs.ox.ac.uk/sites/default/files/Business\\_Taxation/Docs/Publications/Reports/TA\\_3\\_12\\_12.pdf](https://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf)

<sup>9</sup> <https://www.gov.uk/dealing-with-hmrc/tax-avoidance>

<sup>10</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/413931/Tax\\_evasion\\_FIN\\_AL\\_with\\_covers\\_and\\_right\\_sig.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413931/Tax_evasion_FIN_AL_with_covers_and_right_sig.pdf)

<sup>11</sup> <https://www.gov.uk/government/publications/tempted-by-tax-avoidance#1>

advice provided. The member should consider carefully whether the planning in question is robust, whether it could be successfully challenged by HMRC, as well as the reputational risk for the member and the client in being involved in such a transaction. This is set out in more detail on 4.35-4.53.

- 4.16 Some of these features at 4.13 above may also be indicative of money laundering, specifically designed to hide the proceeds of criminal activity, not just tax avoidance. See CCAB anti-money laundering guidance for further detail.

### The GAAR

- 4.17 HMRC's GAAR Guidance [Tax avoidance: General Anti-Abuse Rule - Publications - GOV.UK](#) provides a detailed articulation of what HMRC consider to be reasonable planning through to abusive arrangements, with extensive examples. A key message is in B2.1:

'the GAAR .....rejects the approach taken by the Courts in a number of old cases to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be and however far the tax consequences might diverge from the real economic position'.

Clearly where the GAAR applies, the arrangements will be ineffective (and counteracted by HMRC) and the client should be advised accordingly.

- 4.18 A member should ensure that he is aware of the scope and potential application of the GAAR. He should put appropriate measures in place commensurate with the size of his practice or business and the extent to which he is involved in areas where the GAAR will need to be considered. Measures which may be considered include:
- Training.
  - Technical briefing or guidance material linking to and potentially supplementing HMRC's GAAR Guidance.
  - Protocols to ensure the quality and consistency of treatment. If a member is unsure or does not have the expertise to advise he may wish to seek specialist input or refer the client to a specialist adviser.
  - Raising awareness with clients or internally in the business, especially for those whose affairs may be more complex or who may undertake planning with other advisers.
  - Caveat advice to explain that the GAAR is new with no precedent (or little precedent as some precedents begin to emerge) and given this uncertainty the member cannot guarantee that it will not be applied.
  - Transmittal letters for returns might refer to the GAAR for clients whose affairs may be more complex or who may undertake planning with other advisers.
  - Updating knowledge materials to ensure that they refer to the GAAR where appropriate.
  - Reviewing any existing offerings which might be affected by the GAAR
  - Monitoring output of the GAAR panel.
- 4.19 Even if the member concludes that the GAAR is not expected to apply, the member should advise on the other issues identified in 4.38 as applicable.
- 4.20 A member should note the application of the GAAR to compliance work as set out in 3.23 - 3.25.

- 4.21 From April 2015 a General Anti- Avoidance Rule will apply in Scotland to land and buildings transactions and landfill tax. Differences in drafting and parliamentary intent means the legislative provisions should be consulted before proceeding in those areas.

#### **What happens if an arrangement is challenged under the GAAR?<sup>12</sup>**

- 4.22 Where HMRC wishes to challenge a transaction under the GAAR they must refer the arrangement to the Independent Advisory Panel where the case is heard by a sub-panel of three.
- 4.23 Where arrangements are referred to the GAAR Advisory Panel and the joint opinion of the panel, or the opinion of two or more members of the panel, is that the arrangements are not 'a reasonable course of action' the promoter who has promoted the arrangements will meet a threshold condition for the purposes of the Promoters of Tax Avoidance Schemes (POTAS) regime. See also Chapter 8. If HMRC considers the meeting of this threshold to be significant it must issue a conduct notice to the member unless it is considered inappropriate to do so bearing in mind the impact that the member's activities as a promoter are likely to have on the collection of tax.
- 4.24 If HMRC issue a counteraction notice under the GAAR in relation to the transaction, an Accelerated Payment Notice may also be issued. This will potentially result in the taxpayer having to pay the disputed tax (or part of it) in advance of any resolution through the court system. It should be noted that even if the GAAR Advisory panel consider the transaction to be a 'reasonable course of action' HMRC can still pursue a counteraction notice.
- 4.25 Where an arrangement is successfully challenged under the GAAR then this is an 'occasion of non-compliance' for the Government's Procurement Policy purposes and may affect the ability of the taxpayer concerned to bid for certain Government contracts.
- 4.26 A member should consider the potential reputational and financial impact on his clients and on his own business of promoting arrangements that could be referred to the GAAR Advisory Panel or successfully counteracted under the GAAR. A member should ensure that clients are aware of all the consequences.

#### **The responsibility of a member in giving tax planning advice**

- 4.27 A member is required to act with professional competence and due care within the scope of his engagement letter.
- 4.28 A member should understand his client's expectations around tax advice or tax planning, and ensure that engagement letters reflect the member's role and responsibilities, including limitations in or amendments to that role. The importance of this has been highlighted by the *Mehjoo* case.<sup>13</sup>
- 4.29 A member does not have to advise on or recommend tax planning which he does not consider to be appropriate or otherwise does not align with his own business principles and ethics. However, in this situation the member may need to ensure that the advice he does not wish to give is outside the scope of his engagement (see 4.28). If the member may owe a legal duty of care to the client to advise in this area, the member should ensure that he complies with this by, for example, advising the client that there are opportunities that the client could undertake, even though the member is unwilling to assist, and recommending

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<sup>12</sup> [HMRC GAAR Guidance](#)

<sup>13</sup> *Hossein Mehjoo v Harben Barker* [2014] 4 All ER 806.

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2014/358.html&query=mehjoo&method=boolean>

that the client seeks alternative advice. Any such discussions should be well documented by the member.

- 4.30 Ultimately it is the client's decision as to what planning is appropriate having received advice and taking into account their own broader commercial objectives and ethical stance. However the member should ensure that the client is made aware of the risks and rewards of any planning, including that there may be adverse reputational consequences. It is advisable to ensure that the basis for recommended tax planning is clearly identified in documentation.
- 4.31 Occasionally a client may advise a member that he intends to proceed with a tax planning arrangement without taking full advice from him on the relevant issues or despite the advice the member has given. In such cases the member should warn the client of the potential risks of proceeding without full advice and ensure that the restriction in the scope of the member's advice is recorded in writing.
- 4.32 Where a client wishes to pursue a claim for a tax advantage which the member feels has no sustainable basis the member should refer to Chapter 5 Irregularities for further guidance.
- 4.33 If Counsel's opinion is sought on the planning the member should consider including the question as to whether in Counsel's view the GAAR could apply to the transaction.
- 4.34 It should be noted that any legal opinion provided, for example by Counsel, will be based on the assumptions stated in the instructions for the opinion and on execution of the arrangement exactly as stated. HMRC and the courts will not be constrained by these assumptions.

#### **The different roles of a Tax Adviser**

- 4.35 A member may be involved in tax planning arrangements in the following ways:
- Advising on a planning arrangement.
  - Introducing another adviser's planning arrangement.
  - Providing a second opinion on a third party's planning arrangement.
  - Compliance services in relation to a return which includes a planning arrangement.

A member should always make a record of any advice given.

#### **Primary adviser on a planning arrangement**

- 4.36 When a member advises on a planning arrangement the member should advise of the risks and implications as outlined below and should only recommend the planning for the client's consideration based on a balanced view taking into account any potential risks.
- 4.37 The member should also carefully consider the POTAS regime and the risks, both reputational and financial, of advising on the arrangement.
- 4.38 Any tax advice on planning should consider all the risks and implications. These may include:

#### **Technical considerations**

- The strength of the legal interpretation relied upon.
- The potential application of the GAAR.



- The risk of counteraction. This may occur before the planning is completed or potentially there may be retrospective counteraction at a later date.
- The risk of challenge by HMRC. Such challenge may relate to the legal interpretation relied upon, but may alternatively relate to the construction of the facts, including the implementation of the planning.
- The risk and inherent uncertainty of litigation.
- The probability of the planning being overturned by the courts if litigated and the potential ultimate downside should the client be unsuccessful.

### **Practical considerations**

- The issues involved in the implementation of the planning arrangement.
- The implications for the client, including the obligations of the client in relation to their tax return, if the planning requires disclosure under DOTAS and the potential for an accelerated payment notice or partner payment notice.
- The reputational risk to the client and the member of the planning in the public arena.
- The stress, cost and wider personal or business implications to the client in the event of a prolonged dispute with HMRC. This may involve unwelcomed publicity, costs, expenses and loss of management time over a significant period.
- If the client tenders for government contracts, the potential impact of the proposed tax planning on tendering for and retaining public sector contracts.
- Whether the arrangements are in line with any applicable code of conduct or ethical guidelines or stances.
- The interaction with other external codes of conduct, for example, the Banking Code, and fit and proper tests for charity trustees and pension administrators.

4.39 A member may advise on steps to manage elements of the risk if the client chooses to proceed. For example, the merits with client consent of a full disclosure of the arrangements to HMRC in advance of implementation even if not required by law.

4.40 Depending on whether it is within the scope of his engagement letter with the client the member may wish to suggest alternative arrangements.

### **Introducing another adviser's planning arrangement**

4.41 A member may be invited to introduce his clients to an arrangement from another source. The member would often be paid a commission for making such introductions which must be disclosed and accounted for in line with the member's professional body's rules. See [ICAEW's Code of Ethics B](#), in particular Para 240: Fees and other types of remuneration; and Paras 240.5 et seq: Referrals and commissions, especially Paras 240.7A & B which refer to obtaining the client's consent to the member's retaining commission.

4.42 Prior to considering the third party tax planning the member should ascertain whether the promoter is subject to a monitoring notice within the POTAS regime. The regime carries significant consequences for the monitored promoter, any introducer or intermediary of the monitored promoter and any client that uses a monitored promoter's planning. If the third party is a monitored promoter within the POTAS regime it is difficult to envisage any circumstance in which it would be appropriate for the member to introduce their arrangement to clients.

4.43 Where there is no evidence that the promoter is a monitored promoter under the POTAS regime then the member should appraise the planning and form a view on its effectiveness

and risk considering the points in 4.12 and 4.13 to understand whether the member wishes to be associated with the planning both from a technical and a reputational perspective.

- 4.44 If a member does not have the expertise to assess the transaction and advise the client on the potential risks or if the other adviser does not release all the legal opinions and implementation details to allow the member to analyse the arrangement, the member should inform the client that he is not able to advise on the arrangement. Where appropriate the member should advise the client to consider very carefully the risks.
- 4.45 The member should also consider whether including the relevant tax advantage in a tax return would have a sustainable basis. If there is no sustainable basis the member should not recommend the planning.

#### **Providing a second opinion on a third party's tax planning arrangement**

- 4.46 A client may ask a member to advise on an arrangement offered to the client by another adviser. No commissions should be accepted where a member is providing tax advice on a third party's arrangement as it would undermine the member's objectivity.
- 4.47 The member should consider carefully whether he is qualified to advise the client on the potential technical and reputational risks and rewards of the arrangement. If the member does not have the relevant experience, he should seek specialist support or recommend that the client obtains advice elsewhere. The member may be able to advise on the practical issues involved in participation in a tax planning arrangement, whilst advising the client to take advice elsewhere on the technical merits of the legal interpretation relied upon.
- 4.48 If the member does not have the relevant expertise or if the promoter does not release all the legal opinions and implementation details to allow an assessment to be made, the member should inform the client that they cannot advise on the arrangement and the member should document this.
- 4.49 In advising on the third party's arrangement the member should consider the risks and implications at 4.38. In addition the member should ascertain whether the third party is subject to a monitoring notice under the POTAS regime and the member's advice should include the implications of a monitoring notice for the client should the client wish to proceed. It is difficult to envisage any circumstance in which it would be appropriate for the member to recommend the arrangement if the third party is subject to a monitoring notice.
- 4.50 The member should also make an assessment of and advise the client on whether there is a sustainable filing position for tax return purposes. The member may suggest amendments to the planning. If so, the member should consider the risks and implications of the amended planning, including the position under DOTAS.

#### **Compliance services in relation to returns that include a tax advantage**

- 4.51 A client may have implemented an arrangement offered by another adviser and the member has not been involved in implementing the arrangement. Subsequently the client may ask the member to enter the arrangement on his tax return. In this case the member is not responsible for advising the client on the potential implications of having undertaken the arrangement. However, from a client relationship perspective the member may wish to advise on the potential risk of a challenge.
- 4.52 A member should not include within the tax return a claim for a tax advantage which he considers has no sustainable basis based on the information provided to him.

4.53 If the client provides inadequate information then the member should make a request for further information which will enable him to confirm that there is a sustainable filing position. If no further information is forthcoming, the member should refrain from including a claim for a tax advantage on the tax return, document his decision and explain his reasons to the client. If additional information is received but it is too complex or outside the member's level of expertise to allow any reasonable assessment to be made, he should seek specialist support or recommend that the client obtains advice elsewhere. See also 3.4 – 3.7 and 3.11 – 3.18 and Chapter 5 for further guidance.

**PART 3 GUIDANCE ON SPECIFIC CIRCUMSTANCES****5. IRREGULARITIES****Introduction**

- 5.1 For the purposes of this Chapter, the term 'irregularity' is intended to include all errors whether the error is made by the client, the member, HMRC or any other party involved in a client's tax affairs.
- 5.2 In the course of a member's relationship with the client, the member may become aware of possible irregularities in the client's tax affairs. Unless already aware of the possible irregularities in question, the client should be informed as soon as the member has knowledge of them.
- 5.3 Where the irregularity has resulted in the client paying too much tax the member should advise the client about making a repayment claim and have regard to any relevant time limits. With the exception of this paragraph and 5.21 the rest of this Chapter deals solely with situations where sums may be due to HMRC.
- 5.4 On occasions it may be apparent that an error made by HMRC has meant that the client has not paid tax actually due or he has been incorrectly repaid tax. Correcting such mistakes may cause expense to a member and thereby to his clients. A member should bear in mind that, in some circumstances, clients or agents may be able to claim for additional professional costs incurred and compensation from HMRC. See HMRC's complaints factsheet.<sup>14</sup>
- 5.5 A member must act correctly from the outset. A member should keep sufficient appropriate records of discussions and advice and when dealing with irregularities the member should:
- Give the client appropriate advice;
  - If necessary, so long as he continues to act for the client, seek to persuade the client to behave correctly;
  - Take care not to appear to be assisting a client to plan or commit any criminal offence or to conceal any offence which has been committed; and
  - In appropriate situations, or where in doubt, discuss the client's situation with a colleague or an independent third party (having due regard to client confidentiality).
- 5.6 Once aware of a possible irregularity, a member must bear in mind the legislation on money laundering and the obligations and duties which this places upon him. Further advice can be found at [icaew.com/en/members/regulations-standards-and-guidance/practice-management/anti-money-laundering-guidance](https://www.icaew.com/en/members/regulations-standards-and-guidance/practice-management/anti-money-laundering-guidance)
- 5.7 A member should also consider whether the irregularity could give rise to a circumstance requiring notification to his professional indemnity insurers.
- 5.8 In any situation where a member has concerns about his own position, he should take specialist legal advice. This might arise, for example, where a client appears to have used

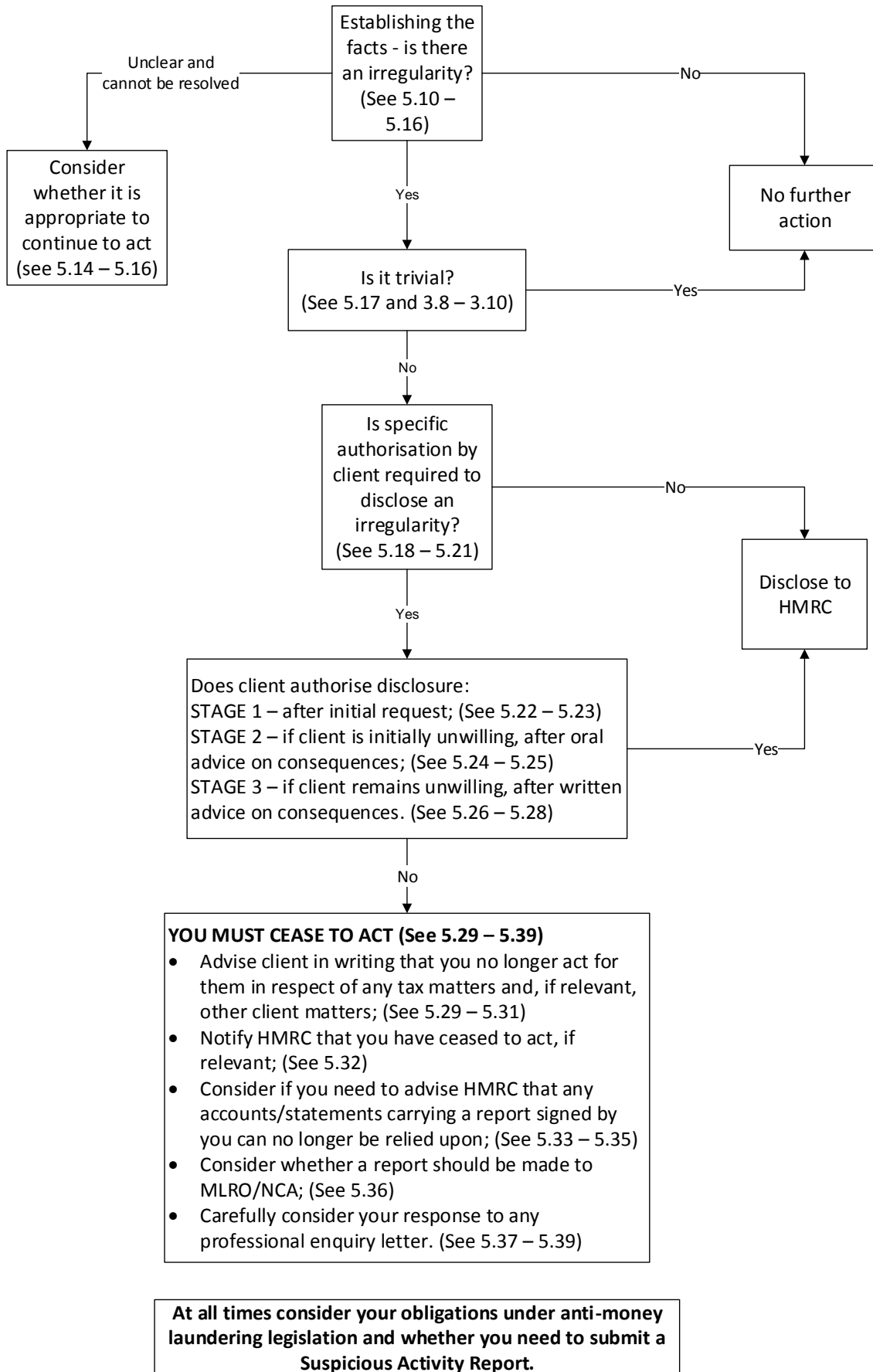
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<sup>14</sup>[Putting things right: how to complain - Factsheet C/FS - Publications - GOV.UK](https://www.gov.uk/government/publications/putting-things-right-how-to-complain)

the member to assist in the commission of a criminal offence in such a way that doubt could arise as to whether the member had acted honestly and in good faith.

- 5.9 The flowchart below summarises the recommended steps a member should take where a possible irregularity arises. It must be read in conjunction with the guidance and commentary that follow it.

**STEPS TO TAKE IF THERE IS A POSSIBLE IRREGULARITY**



## **Establishing the facts**

- 5.10 Although a member is not under a duty to make enquiries to identify irregularities which are unrelated to the work in respect of which he has been engaged, if he does become aware of any irregularity in a client's tax affairs he should follow this guidance, whether in relation to a matter on which he has acted or not.
- 5.11 A member who suspects that an irregularity may have occurred should discuss this with the client to remove or confirm the suspicion. He should take into account the fact that he may not be aware of all the facts and circumstances and may not, therefore, be able to reach a conclusion.
- 5.12 If the irregularity concerns the accounts but is not material from an accounting perspective in general no adjustment is needed and no further action is required. See 3.8 -3.10.
- 5.13 Where the client provides an explanation for the apparent irregularity to the satisfaction of the member, the member is free to continue to act for that client.
- 5.14 Where the client fails to explain the apparent irregularity to the satisfaction of the member, the member should consider whether it is appropriate to continue to act. Where the member concludes that it is appropriate to continue to act he should monitor the position carefully. Should it later become apparent that there is an irregularity despite the client's previous assurances to the contrary the member should follow the advice in the flowchart at 5.9. In cases where a member ceases to act, he should follow the guidance in 5.29 - 5.39.
- 5.15 If a member is in doubt as to whether there is an irregularity the member should consider seeking specialist advice. Likewise correcting more serious errors can require specialist help where again assistance may be required. In some situations the client may wish to seek or the member should recommend a second opinion.
- 5.16 Whether the member decides to continue to act for the client or not, the member should protect his position and record his compliance with this guidance by documenting:
- The discussions he has had with his client, any colleague, specialist and/or HMRC;
  - The client's explanations; and
  - His conclusion and the reasons for reaching that conclusion.
- It may be appropriate to confirm the facts in writing with the client.

### **Is the irregularity trivial?**

- 5.17 As a general principle all known irregularities should be corrected (save for non-material adjustments as described in 5.12 above). In the opinion of the professional bodies it is reasonable for a member to take no steps to advise HMRC of isolated errors where the tax effect is no more than minimal, say up to £200, as these will probably cost HMRC and the client more to process than they are worth to the Exchequer.

### **Is specific authorisation by client required to disclose an irregularity?**

- 5.18 A member must ensure that he has authority to disclose an error to HMRC. This could be specific authority agreed with the client or a general authority contained in a letter of engagement. If in any doubt or if the amount of tax involved is material the member should confirm the position with the client. See also 6.9.
- 5.19 If the client withdraws the member's authority to correct the error, the member should follow the guidance in 5.26 – 5.39.

5.20 A member must have the client's authority to agree a negotiated figure following disclosure of the facts and circumstances. A member cannot agree a figure that he knows to contain an error.

5.21 In all cases where HMRC has sent an over-repayment to the member he must return it to HMRC as soon as practicable. A member does not require his client's authority to return an excessive repayment but, as a matter of course, he should notify his client that he has done so.

**Stage 1: Asking the client for authority to disclose**

5.22 Subject to the circumstances set out in 5.18 - 5.21 above, the client should be asked to authorise the member to notify HMRC of the error. A member should encourage the client to make a timely disclosure. The member should advise the client of his obligations under the relevant tax legislation and refer, as relevant, to interest, surcharges, penalties and the rules concerning the delayed correction of innocent errors.

5.23 Whether the client follows the member's advice is, ultimately, the client's decision. If, however, the client decides not to act in accordance with the member's advice as to his obligations, the member should take the further steps detailed in 5.24 – 5.39.

**Stage 2: Advising the client of the consequences of failure to disclose**

5.24 Where it appears that the client is reluctant to authorise disclosure of the irregularity to HMRC, the member should explain to the client:

- The potential consequences of non-disclosure;
- The benefit of making a voluntary disclosure especially as regards reduced penalties; and
- The wide ranging powers to obtain information from taxpayers, their agents and third parties available to HMRC.

This will also include the member explaining that he will:

- Be required to put his advice that disclosure is required in writing;
- Be obliged to cease to act and in some circumstances to disassociate himself from any work done, should disclosure not be made. The client should be left in no doubt that adverse inferences could be made and that this step could result in HMRC commencing enquiries which might lead to the discovery of the non-disclosure; and
- Comply with his professional obligations relating to the appointment of a new adviser, as it is the duty of professional advisers before accepting professional work to communicate with the person who previously acted in connection with that work.

5.25 Where the client is an organisation and the client contact still remains reluctant to authorise disclosure of the irregularity to HMRC, the member should raise the issue at a higher level within the client organisation. If, having followed this approach, the client continues to be reluctant to authorise disclosure to HMRC, the member should follow the guidance set out in 5.26 – 5.39.

**Stage 3: Advising the client in writing of the consequences of failure to disclose**

5.26 Where the client remains unwilling to make a full disclosure to HMRC the member should ensure that his conduct and advice are such as to prevent his own probity being called into question. It is essential therefore to advise the client in writing, setting out the facts as



understood by the member, confirming to the client the member's advice to disclose and the consequences of non-disclosure.

- 5.27 If, after being advised in writing, the client prevaricates about making a full disclosure, the member must consider at which point the prevarication should be treated as a refusal to disclose.

#### **Actions where the client refuses to disclose**

- 5.28 If, despite being fully advised of the consequences, the client still refuses to make an appropriate disclosure to HMRC, the member must:
- Cease to act;
  - If relevant, inform HMRC of his withdrawal;
  - Consider withdrawing reports signed by the member;
  - Consider whether a money laundering report should be made to the firm's MLRO/NCA; and
  - Consider carefully his response to any professional enquiry letter (also known as professional clearance letter).

These obligations are set out in more detail below.

#### **Ceasing to act**

- 5.29 Where the member must cease to act in relation to the client's tax affairs he should inform the client in writing accordingly.
- 5.30 If HMRC were to realise that the member had continued to act after becoming aware of such undisclosed errors, the member's relationship with HMRC would be prejudiced. HMRC might, in some circumstances, consider the member to be knowingly or carelessly concerned in the commission of an offence or be engaged in dishonest conduct.
- 5.31 The member should consider carefully whether it is appropriate to continue to act in relation to any non-tax matters of the client.

#### **Informing HMRC**

- 5.32 Where the member had been dealing with HMRC on the client's behalf or had been formally appointed as a tax agent, the member should notify HMRC that he has ceased to act for that client. Because of the obligation to maintain client confidentiality a member should not provide HMRC with an explanation as to the reasons for ceasing to act.

#### **Withdrawing reports signed by the member**

- 5.33 Where a member has undertaken work to verify or audit accounts or statements which carry a report signed by the member which is subsequently found to be misleading, the same principles of client confidentiality apply. If the engagement letter provides the member with the authority to notify HMRC in such circumstances, he should inform HMRC that he has information indicating that the accounts or statements cannot be relied upon.
- 5.34 If the member does not have his client's consent to the disclosure, he should write to the client and explicitly ask for permission to withdraw the report; if unsuccessful, he should then obtain specialist legal advice as to what action he should take.

- 5.35 A member should not explain to HMRC the reasons why the returns, accounts, etc. are defective. To do so without the client's consent is more likely than not to be considered by a court of law as a misuse of confidential information and an unjustified breach of client confidentiality.

### **Reporting to MLRO/NCA**

- 5.36 In deciding whether a report should be made to NCA, the member (or the member's MLRO) should take into account the various requirements of the legislation and any reporting exemption which might apply. See Chapters 6 and 7 of the CCAB guidance.

### **Professional enquiry (also known as professional clearance)**

- 5.37 Having ceased to act the member may be approached by a prospective adviser for information relevant to the decision of whether to accept the appointment or not.
- 5.38 Before responding to a request for information from a prospective adviser, a member must ensure that he has authority from the former client to disclose all the information needed and reasonably requested by the prospective adviser to enable him to decide whether to accept the work. Only to the extent that he is authorised to do so should the member discuss freely with the prospective adviser all matters of which the prospective adviser should be made aware.
- 5.39 If the client refuses permission to the member to discuss all or part of his affairs, the member should inform the prospective adviser of this fact. It is then up to the prospective adviser to make enquiries from the client as to the reasons for such a refusal.

### **Other related matters**

#### **Self-assessment**

- 5.40 Where the error relates to a self-assessment return the client must amend any self-assessment affected by the error providing he is within time to do so. Where the time limit for amending a self-assessment has passed the client should provide HMRC with sufficient and accurate information to explain the error. If HMRC fails, or is unable, to take any necessary action, for example to issue a discovery assessment, a member is under no legal obligation to draw HMRC's failure to their attention, nor to take any further action. Where it is relevant a member should ensure that the client is aware of the potential for interest and/or penalties.

#### **Decisions of Tribunals or Courts**

- 5.41 It is possible that after a client has made a self-assessment return a later (perhaps years later) unrelated decision of the Tribunal or Court may cast doubt on whether the self-assessment return was made on the correct basis.
- 5.42 A member is not under a duty to monitor all returns and all tax cases for many years after the returns have been filed to identify this rare event. However, if the member is aware of such a situation they should determine whether the interpretation in the court or tribunal case is applicable to the client's return. The member may wish to consider seeking specialist advice if in doubt. The member should also ascertain whether the case is to be appealed and may await the outcome of any appeal. Where there is a final decision which is applicable to the client's return(s), the member should refer to 5.43 – 5.47 below to determine what action may be required.

What corrective action is required?

- 5.43 Whether a client needs to correct an irregularity when a later court or tribunal decision casts doubt on a past return is a complex question and one that presents practical difficulties.
- 5.44 Where the client's return is under enquiry, it remains open and can be amended in the normal manner.
- 5.45 The following broad principles should be applied where the client's return is not under enquiry:
- Subject to whether there is any further appeal, a decision of a Court is regarded as determining how the law should always be applied. A member will however need to have regard to whether the facts of the relevant case can be distinguished from the client's circumstances.
  - Unless the basis upon which the self-assessment was made was sufficiently clear in the original return, or there is continuity of treatment of the item from previous returns, or the item was treated in accordance with 'prevailing practice' the client should notify HMRC of the possible deficiency in his return.
  - The member should have regard to HMRC's powers to make a discovery assessment where the tax is out of normal time for assessment (generally four years).
- 5.46 In cases involving marketed tax avoidance schemes HMRC may assert that longer time limits apply for example where there was no disclosure at all or a DOTAS SRN was not put on the return. Members should be careful not to accept an allegation by HMRC of negligent/ careless or fraudulent/ deliberate conduct by the client or the member without seeking specialist advice first.
- 5.47 If a client in this situation refuses to authorise disclosure to HMRC then unless the member has expert knowledge in this area he should recommend that a second opinion be sought and otherwise treat this situation in the same way as any other irregularity.

## 6. ACCESS TO DATA BY HMRC

### Introduction

- 6.1 For the purposes of this Chapter the term 'data' includes documents in whatever form (including electronic) and other information. While this guidance relates to HMRC requests, other government bodies or organisations may also approach the member for data. The same principles apply.
- 6.2 A distinction must be drawn between a request for data made informally and those requests for data which are made in exercise of a power to require the provision of the data requested ('statutory requests').
- 6.3 Similarly, requests addressed to a client and those addressed to a member require different handling.
- 6.4 Where a member no longer acts for a client, the member remains subject to the duty of confidentiality. In relation to informal requests, he should refer the enquirer either to the former client or to his new agent. In relation to statutory requests addressed to the member, the termination of his professional relationship with the client does not affect his duty to comply with that request, where legally required to do so.
- 6.5 A member should comply with reasonable statutory requests and should not seek to frustrate legitimate requests for information. Adopting a constructive approach may help to resolve issues promptly and minimise costs to all parties.
- 6.6 Whilst a member should be aware of HMRC's powers in relation to the access, inspection and removal of data, given the complexity of the law relating to information powers, it may be appropriate to take specialist advice.
- 6.7 Revenue Scotland will have separate powers under the Revenue Scotland and Tax Powers Act 2014.

### Informal requests addressed to the member

- 6.8 Disclosure in response to informal requests not made under any statutory power to demand data can only be made with the client's permission.
- 6.9 Sometimes the client will have authorised routine disclosure of relevant data, for example, through the engagement letter. However, if there is any doubt about whether the client has authorised disclosure or about the accuracy of details, the member should ask the client to approve what is to be disclosed.
- 6.10 Where an oral enquiry is made by HMRC, a member should consider asking for it to be put in writing so that a response may be agreed with the client. A member is reminded of the importance of confirming the identity and authority of any caller seeking information about clients so as to minimise the risk of breaching client confidentiality.
- 6.11 Although there is no obligation to comply with an informal request in whole or in part, a member should advise the client whether it is in the client's best interests to disclose such data.
- 6.12 Informal requests may be forerunners to statutory requests compelling the disclosure of data. Consequently, it may be sensible to comply with such requests or to seek to persuade HMRC that a more limited request is appropriate. The member should advise the client as to the reasonableness of the informal request and likely consequences of not providing the data, so that the client can decide on his preferred course of action.

### **Informal requests addressed to the client**

- 6.13 From time to time HMRC chooses to communicate directly with clients rather than with the appointed agent.
- 6.14 HMRC recognises the significant value which tax agents bring to both their clients and to the operation of the tax system. However, HMRC has also made it clear that on occasions it may deal with the taxpayer as well as, or instead of, the agent.
- 6.15 Examples of where HMRC may contact a member's client directly include:
- Where HMRC is using 'nudge' techniques to encourage taxpayers or claimants to re-check their financial records or to change behaviour;
  - Where HMRC has become aware of particular assets, such as offshore investments, and the taxpayer is encouraged to consider whether a further tax disclosure is required;
  - Where the taxpayer has engaged in what HMRC considers to be a tax avoidance scheme, as HMRC considers that this will better ensure that the client fully understands HMRC's view.
- 6.16 HMRC has given reassurances that it is working to ensure that initial contact on compliance checks will normally be via the agent and only if the agent does not reply within an appropriate timescale will the contact be direct to the client.
- 6.17 When the member assists a client in dealing with such requests from HMRC, the member should apply the principles in 6.8 -6.12 above.

### **Statutory requests addressed to the client**

- 6.18 In advising the client a member should consider whether the notice is valid, how to comply with the request and the consequences of non-compliance. Specialist advice may be needed, for example on such issues as whether the notice has been issued in accordance with the relevant tax legislation, whether the data requested is validly included in the notice, legal professional privilege and human rights.
- 6.19 Even if the notice is not valid, in many cases the client may conclude that the practical answer is to comply. If the notice is legally effective the client is legally obliged to comply with the request.
- 6.20 The member should also advise the client about any relevant right of appeal against the statutory request if appropriate and of the consequences of a failure to comply.

### **Schedule 36 Finance Act 2008 statutory notices**

- 6.21 The most common statutory notice issued to clients and third parties by HMRC is under Schedule 36 FA 2008. The following notes relate only to civil enquiries; in any situation where the member knows or suspects that HMRC is undertaking a criminal investigation, specialist assistance should be sought.
- 6.22 Schedule 36 FA 2008 allows HMRC to require a taxpayer and/or a third party to provide data reasonably required to check the taxpayer's tax position within a specified time. HMRC can also inspect business premises and remove and/or copy data.

- 6.23 A member may be asked to assist clients who have received such a notice. A member should be familiar with the rules relating to HMRC's powers to issue a Schedule 36 notice and the relevant rights of appeal and should advise only where experienced to do so. Where appropriate, experienced tax investigation assistance should be obtained. This is especially relevant where the notice is issued by HMRC's Specialist Investigations or Counter Avoidance Directorate teams or the matter otherwise appears complex or contentious.
- 6.24 The provisions of Schedule 36 are themselves complex and outside the scope of this guidance. There are limited rights of appeal against a Schedule 36 notice and no right of appeal if the Tribunal approved the issue of the notice before it was issued. The following points in relation to a member's conduct should be noted:
- HMRC can only issue a notice to a third party where it is approved by the First-tier Tribunal or where the taxpayer to whom the notice relates agrees to the issue. If a member is asked by a client whether the issue of such a notice should be agreed to, the member should be able to explain to the client what action HMRC may take if permission is refused.
  - HMRC may agree to extend any deadline for submission of the data depending on the circumstances. Any request for more time should be made well in advance of the deadline where possible.
  - Schedule 36 does not allow HMRC to force entry to premises and the client can refuse HMRC entry. However, where possible the client should be made aware of the potential consequences and penalties that can be charged for obstruction of HMRC officers during an inspection. HMRC should be refused entry only where the client has good reasons for doing so. In any such case the member should recommend that the client seeks specialist advice.
  - A Schedule 36 notice does not override legal professional privilege. There is also a statutory privilege contained within Schedule 36 restricting access to data from tax advisers. A member needs to be aware of these restrictions and take specialist advice where appropriate in such cases.

### **Statutory requests addressed to the member**

- 6.25 The same principles apply to statutory requests to the member as statutory requests to clients.
- 6.26 If a statutory request is valid it overrides the member's duty of confidentiality to his client. The member is therefore obliged to comply with the request. Failure to comply with his legal obligations can expose the member to serious civil and criminal penalties. Any doubt about whether the statutory request overrides the member's duty of confidentiality to his client can be addressed by either:
- Obtaining the client's consent to the disclosure; or
  - Seeking specialist advice as to the validity of the notice.
- 6.27 In cases where the member is not legally precluded by the terms of the notice from communicating with the client, the member should advise the client of the notice and keep the client informed of progress and developments.
- 6.28 The member remains under a duty to preserve the confidentiality of his client, subject to the general points in 2.16, so care must be taken to ensure that in complying with any notice the member does not provide information or data outside the scope of the notice.

- 6.29 If a member is faced with a situation in which HMRC is seeking to enforce disclosure by the removal of data, the member should consider seeking immediate advice from a specialist adviser or other practitioner with relevant specialist knowledge, before permitting such removal, to ensure that this is the legally correct course of action.
- 6.30 Where a Schedule 36 notice is in point a member should note that it does not allow HMRC to inspect business premises occupied by a member in his capacity as an adviser. Specialist advice should be sought in any situation where HMRC asserts otherwise.

### **Privileged data**

- 6.31 Legal privilege arises under common law and may only be overridden if this is expressly or necessarily implicitly set out in legislation. It protects a party's right to communicate in confidence with a legal adviser. The privilege belongs to the client and not to the member. If a document is privileged:
- The client cannot be required to make disclosure of that document to HMRC and a member should be careful to ensure that his reasons for advising a client nevertheless to make such a disclosure are recorded in writing.
  - It must not be disclosed by any other party, including the member, without the client's express permission.
- 6.32 There are two types of legal privilege under common law, legal advice privilege covering documents passing between a client and his legal adviser prepared for the purposes of obtaining or giving legal advice and litigation privilege for data created for the dominant purpose of litigation. Litigation privilege may arise where litigation has not begun, but is merely contemplated and may apply to data prepared by non-lawyer advisers (including tax advisers) if brought into existence for the purposes of the litigation.
- 6.33 Communications from a tax adviser who is not a practising lawyer will not attract legal advice privilege but other similar protections exist under statute law, including:
- A privilege reporting exemption which applies to the reporting of money laundering in certain circumstances. See Chapter 7 of the CCAB guidance for further details.
  - A privilege under Schedule 36 whereby a tax adviser does not have to provide data that is his property and which constitute communications between the adviser and either his client or another tax adviser of the client. Information about such communications is similarly privileged. However, care should be taken as not all data may be privileged.
- 6.34 Whether data is or is not privileged and protected from the need to disclose is a complex issue, which will turn on the facts of the particular situation.
- 6.35 A member who receives a request for data, some of which he believes may be subject to privilege, should take independent legal advice on the position, unless expert in this area.

## 7. VOLUNTARY DISCLOSURES UNDER DISCLOSURE FACILITIES

- 7.1 HMRC is increasingly making use of disclosure facilities to encourage voluntary disclosures from previously non-compliant taxpayers
- 7.2 It is in the public interest that taxpayers who wish to regularise their tax affairs should receive competent and ethical support from a suitably experienced tax adviser. However, there are risks to the member and the profession in accepting such engagements which should be carefully managed as set out below.
- 7.3 The use of disclosure facilities is a specialised area and often involves tax liabilities on income arising or assets kept offshore. A member should not undertake this type of activity unless he has the relevant experience and knowledge or obtains specialist support.
- 7.4 Before accepting a prospective client for a voluntary disclosure, a member should consider carefully the following factors:
- The member must seek to reassure himself that the client will make a full and frank disclosure to the member and regularise his affairs in all respects.
  - The member should make enquiries as to the source of any undeclared funds. If there are suspicions that the funds may result from wider criminal activities unrelated to tax, the member will need to consider carefully whether to accept the client or not.
  - The member should be alert to the possibility that criminals may use regularisation of their tax affairs as a method to bring illegally acquired funds back into the regular economy.
- 7.5 The member is strongly recommended to meet the prospective client face to face as part of assessing these matters.
- 7.6 The member should make it clear to the prospective client that he will only accept the engagement on the basis of full disclosure and regularisation of all aspects of the prospective client's tax affairs. If in any doubt as the case progresses, the member should refer to the provisions in Chapter 5 concerning disclosure of irregularities.
- 7.7 The member must at all stages of his interaction with any prospective client comply with his obligations under anti-money laundering legislation. The profile of such an engagement suggests that these clients are at higher risk than usual of being involved in money laundering, so extra Customer Due Diligence checks may be needed.
- 7.8 In deciding whether a suspicious activity report should be made to NCA, the member (or the member's MLRO) should take into account the various requirements of the legislation and any reporting exemption which may apply. It is also possible that the member may need to apply for consent to proceed at some point during the engagement. See the CCAB guidance.
- 7.9 If the member becomes concerned about the client's conduct and circumstances at any stage during the engagement, the member should reassess his anti-money laundering obligations and, subject to his anti-money laundering obligations against 'tipping off' (see CCAB guidance), consider resigning from acting for the client.



## 8. DISCLOSURE OF TAX AVOIDANCE SCHEMES (DOTAS), FOLLOWER NOTICES, ACCELERATED PAYMENT OF TAX AND PROMOTERS OF TAX AVOIDANCE SCHEMES (POTAS)

8.1 The aim of this Chapter is to give an overview. There are ongoing changes in these areas and a member should ensure he is aware of the most up-to-date position. See also HMRC guidance.<sup>15</sup>

### DOTAS

#### Introduction

8.2 There are two different regimes covering the disclosure to HMRC of certain tax arrangements. Under the VAT Avoidance Disclosure Regime (VADR) responsibility currently lies with the taxpayer to make the disclosure; for other taxes the responsibility will usually lie with the promoter of the arrangement, although the taxpayer may have a disclosure obligation in certain circumstances.

8.3 Once a disclosure has been made HMRC may issue a Scheme Reference Number to the arrangements. The issuance of a SRN does not mean that HMRC has accepted the arrangement. Disclosure is not a clearance or an approval process. Similarly disclosure of an arrangement does not mean it includes 'tax avoidance'.

8.4 The responsibility of the member is to be aware of the rules, to comply with them and to advise clients as to their obligation. The member should also advise clients of the consequences of failure to comply.

8.5 Failure to comply with the regime can have a number of adverse consequences including:

- Failing to disclose an arrangement within the relevant time limits can incur significant penalties of up to £1 million as well as reputational damage to the member.
- Failing to disclose an arrangement or failing to supply details of clients who have implemented disclosed planning (quarterly client lists) constitutes meeting a threshold condition for the Promoters of Tax Avoidance Schemes (POTAS) regime and may therefore result in the issuance of a conduct notice to the promoter (see 8.32 – 8.35 for more detail).

8.6 The onset of Accelerated Payment Notices and Partner Payment Notices for DOTAS arrangements means that the focus on compliance with the regime is starting to increase.

8.7 The member should also advise clients of the consequences, including penalties, of failure to comply with their DOTAS obligations.

#### Main regime

8.8 This regime applies to income tax, corporation tax, capital gains tax, inheritance tax, stamp duty land tax, annual tax on enveloped dwellings and national insurance contributions. 8.9 – 8.16 address the professional conduct issues where a generic disclosure requirement falls upon a member as a promoter of disclosable arrangements for taxes other than VAT. For technical details of the scope and application of such obligations, reference should be made to the relevant legislation and HMRC's guidance published on their website.<sup>16</sup>

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<sup>15</sup> [Dealing with HMRC: Tax avoidance - GOV.UK](#)

<sup>16</sup> [HMRC Disclosure of Tax Avoidance Schemes](#)

- 8.9 A member should be aware of the type of tax advice and actions which could cause them to be designated as a promoter for DOTAS purposes and be able to identify potentially disclosable items in respect of the taxes upon which he advises. This is particularly important since some planning which may require disclosure may not intuitively appear to be within the scope of the regime and there are very tight time limits.
- 8.10 Under the regime applicable at the time of publishing this guidance, the obligation falls upon any 'promoter' but excludes employees of promoters. A member who is an employee of a promoter is accordingly not legally responsible under the applicable legislation for his employer's compliance and the rest of this Chapter should be read with this in mind. A member who is not comfortable with the approach his employer is taking to such obligations should consider seeking advice.
- 8.11 Failure to comply with the disclosure regulations may result in significant penalties and reputational damage both for promoters and scheme users and will potentially bring the promoter within the scope of the POTAS regime. HMRC has indicated that such failure will be viewed seriously.
- 8.12 As set out in 2.14, a member must observe client confidentiality unless there is a legal or professional right or duty to disclose the information. In this regard, the regime requires the promoter to provide certain details to HMRC in respect of clients who have entered into disclosed arrangements within a prescribed period of time. Details are set out in the HMRC guidance referred to in 8.8 above.
- 8.13 Although a member may take advice from others, such as Counsel, or listen to the views of his client upon disclosure regime matters, the member remains responsible for the disclosure and should not cede control over such decisions to his client or third parties.
- 8.14 A member should put in place instructions, systems and processes to ensure compliance with his disclosure obligations to the extent appropriate given the size of the practice and the frequency with which he is involved in areas which could give rise to disclosure obligations.
- 8.15 It should be noted that accelerated payments of tax and NIC can be demanded by HMRC in DOTAS cases. This will raise the profile of compliance with the regime and emphasises the need for a member to put in place sound governance.
- 8.16 Where a disclosure obligation falls upon the client, and the role of the member is one of advising his client on disclosure obligations and drafting disclosures for client approval where instructed to do so, reference should be made to Chapter 3 for the relevant professional conduct guidance.

## VAT

- 8.17 There are specific requirements for the disclosure of VAT avoidance schemes. The client must inform HMRC if they take part in a 'listed scheme' as defined by the legislation as one that is specified as a 'designated scheme'<sup>17</sup>.
- 8.18 A limited exception from disclosure applies if the client's annual turnover (or if part of a group the turnover of the group of which the client is a member) is less than a designated threshold.
- 8.19 Additionally, the client, or any taxable person who participates in a scheme whose purpose is to obtain a tax advantage, must notify HMRC if it triggers certain 'hallmarks of

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<sup>17</sup> See Schedule 11A to the VAT Act 1994 and VAT (Disclosure of Avoidance Schemes) (Designations) Order 2004 (SI 2004/1933)

avoidance'.<sup>18</sup> Someone acting purely in an advisory capacity is not considered to be party to a scheme, so is not required to make the notification.

- 8.20 A member may consider whether his clients would benefit if any tax avoidance scheme that he was promoting was 'Voluntarily Registered' with HMRC. In this way, the member would be issued with a SRN by HMRC, which the member should pass on to his client. The client then is exempted from the requirement to notify such schemes to HMRC. However, the Voluntary Registration scheme does not exempt the client from the requirement to notify his use of a 'listed scheme'.

### **Follower notices and accelerated payments of tax**

- 8.21 Follower notices may be issued by HMRC where the taxpayer has obtained a tax advantage, there is a live appeal or open enquiry and where there has been a final judicial ruling by the Tribunal or Courts in a case that is relevant to the position of the taxpayer and the taxpayer has not accepted that result.
- 8.22 A member should advise the client as to the consequences of not complying with the notice and the potential penalty of 50% of the denied advantage. A member should consider seeking specialist advice.
- 8.23 HMRC can issue an accelerated payment notice<sup>19</sup> if:
- There is an enquiry in progress or a pending appeal;
  - The return/claim has been made on the basis that the tax advantage results from the scheme; and;
  - One of the three tests set out below are met:
  - A follower notice has been issued; or
  - The disputed tax relates to an arrangement which is both notifiable under the DOTAS rules and which has been allocated a DOTAS SRN; or
  - A GAAR counteraction notice has been issued.
- 8.24 Accelerated payment notices require payment of the disputed tax within 90 days of the date the notice was given. However, although the notice cannot be appealed the client can make representations to HMRC about the amount or about one of the conditions set out in 8.23 above not being met.
- 8.25 When a member's client receives a notice the following should be considered as soon as possible:
- Have the conditions in the legislation been met such that the notice has been validly issued? If not, is there scope for a Judicial Review challenge?
  - Is the HMRC calculation correct?
  - Should representations be made to HMRC regarding the tax demanded within the 90 day limit, which will then delay the payment date?

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<sup>18</sup> See VAT Notice 700/8 and as specified in Schedule 11A to the VAT Act 1994 and the VAT (Disclosure of Avoidance Schemes) Regulations 2004 (SI 2004/1929).

<sup>19</sup> Members should also be aware that there slightly modified rules for the issue of a Partner Payment Notice in Schedule 32 to the FA 2014.

- Does the client wish to consider settlement of the case with implications for penalties, interest, potential 'success' fees to a promoter and the risk of jeopardising the chances of a claim against the promoter? The member should advise the client to check the terms of engagement with the promoter to ascertain whether there are any restrictions on his agreeing or settling with HMRC;
- Should the client seek a closure notice to accelerate the appeal process?
- Should the client explore a time to pay arrangement for a settlement or for an accelerated payment? and
- Will there be other consequences for the client's tax affairs?

### **Accepting HMRC settlement opportunities**

- 8.26 Sometimes HMRC will give taxpayers a chance to settle their tax liabilities by agreement, without the need for legal action. HMRC has stated in its Litigation and Settlement Strategy that 'HMRC will not settle by agreement for an amount which is less than it would reasonably expect to obtain from litigation.'
- 8.27 Where there is not an official settlement opportunity an approach can be made to HMRC to settle the tax and withdraw from the scheme, usually by contract settlement.
- 8.28 Where HMRC communicates a settlement opportunity in relation to a client's tax affairs a member should only provide advice on the settlement if competent to do so. If the matter is not within the member's competence he should recommend that the client gets specialist advice.
- 8.29 The member should:
- Check the technical accuracy of the proposed settlement.
  - Explain the terms of the settlement opportunity to the client including the quantum and timing of any tax that may need to be paid under the settlement.
  - Explain the alternatives to settling and the tax consequences.
  - Where a taxpayer declines the settlement opportunity, HMRC has stated that it will increase the pace of its investigations and move disputes quickly to legal action. Where the client does not want to settle the member must make sure the client understands the consequences of not settling including the reputational aspects of proceeding to litigation.

### **POTAS**

- 8.30 The POTAS regime was introduced in 2014 to deal with the threats posed by tax advisers who HMRC consider to be high risk. HMRC has said 'The purpose of the POTAS legislation is to deal with a small number of promoters who operate in a culture of non-disclosure, non-co-operation and secrecy. For such promoters, the meeting of threshold conditions will be a recognisable part of continuing and deliberate patterns of behaviour'.
- 8.31 The regime uses a series of threshold conditions to identify advisers that might be high risk and allows HMRC to issue conduct notices imposing certain conditions on the adviser. If a conduct notice condition is considered to be breached HMRC can apply to the Tribunal for a monitoring notice. If the application is successful the adviser is 'monitored' and is subject to additional reporting requirements, significant penalties and 'publicity' provisions. To fall

within the POTAS regime the adviser must be a 'promoter' and this definition is very similar to the DOTAS regime definition of 'promoter'.

### **Threshold conditions and conduct notices**

8.32 If one or more threshold conditions is met, an authorised HMRC officer is obliged to issue a conduct notice to the promoter, subject to safeguards (or filters) relating to significance and tax impact.

8.33 The threshold conditions are as follows:

1. HMRC publishing information about the promoter as a deliberate tax defaulter;
2. The relevant person has been named in a report under the Code of Practice on Taxation for Banks by reason of promoting arrangements which they cannot reasonably have believed achieved a tax result which was intended by Parliament;
3. The promoter is given a conduct notice as a dishonest agent;
4. The promoter fails to meet DOTAS obligations (reasonable excuse is ignored for these purposes) ;
5. The promoter is charged with a relevant criminal offence (even if not yet found guilty);
6. Arrangements that the adviser has promoted are regarded as unreasonable by a majority of the GAAR advisory panel;
7. A professional body of which the promoter is a member takes disciplinary action against him;
8. A regulatory authority imposes certain sanctions on the promoter;
9. The promoter fails to comply with an information notice;
10. The promoter imposes certain restrictive contractual terms on clients; and
11. The promoter continues to promote arrangements despite being given a stop notice in respect of those arrangements.

If conditions 1,2,3,5 or 6 are met they cannot be regarded as insignificant and a conduct notice must be issued unless the tax impact safeguard applies. The HMRC officer will usually discuss matters before issuing a conduct notice to allow for isolated or trivial compliance failures.

8.34 A conduct notice can last for up to two years. There is no right of appeal against a conduct notice.

8.35 Legal advice should be obtained where a member is:

- Contacted by an authorised officer, who advises a conduct notice may be issued;
- Issued with a conduct notice;
- Aware that he has breached the conduct notice conditions thereby rendering himself liable to HMRC approaching the First-tier Tribunal to authorise a monitoring notice, which can result in significant compliance conditions and increased penalties, as well as business threatening reputational consequences;

- Aware other proceedings may be taken against him; or
- Not confident of the legal position.

### **Monitoring notices**

- 8.36 Where HMRC consider that a condition in a conduct notice has been breached it can apply to the First-tier Tribunal for approval to issue a monitoring notice. A member may make representations to the tribunal in respect of the monitoring notice but there is no specific right for a member to appear in front of the tribunal. A member may appeal the tribunal's decision to approve a monitoring notice.
- 8.37 Once the issuance of a monitoring notice is approved by the tribunal additional consequences arise for both the promoter and his client.
- 8.38 For the monitored promoter:
- Certain 'publication' provisions apply including HMRC publishing that the promoter is monitored and has failed to comply with a conduct notice, requirements that the promoter must advise of his 'monitored' status on the internet and all other publications and correspondence, and requiring the promoter to provide clients with his unique 'Promoter Reference Number' (PRN).
  - Enhanced information powers for HMRC in relation to the promoter's activities and clients, backed by new penalties. These override the client confidentiality provisions as detailed in 2.14 – 2.18 and Chapter 5.
  - Other matters such as limitations to the defence of reasonable excuse, and a criminal offence of concealing, destroying or disposing of documents.
- 8.39 For clients of the monitored promoter:
- A duty to notify HMRC of use of the monitored promoter's arrangement with high penalties for non-compliance and extended time limits for assessments.
- 8.40 Most of the additional provisions are effective once the tribunal has confirmed the monitoring notice. However, the provisions that involve publicising the monitored promoter do not come into force until any appeal process in relation to the imposition of the notice has been exhausted.

## 9. TAX EVASION

- 9.1 The principles in Chapter 7 apply equally to this Chapter.
- 9.2 Tax evasion is illegal and may involve understating turnover, overstating deductible expenses, false invoicing or backdating documents.
- 9.3 Tax evasion can also occur in the context of what purports or appears to be a plan to reduce tax liabilities within the law if there is deliberate concealment of the relevant facts from HMRC or if HMRC is misled.
- 9.4 A dishonest intention not to pay the tax if it is ultimately shown to be lawfully due or a wilful disregard as to how the tax would be paid can be indicative of tax fraud. For such reason a Counsel's opinion on the technical analysis does not guarantee that arrangements could not be construed as tax fraud.
- 9.5 HMRC and other tax authorities internationally are increasingly considering whether some cases of tax avoidance may involve elements of criminal behaviour. A member should remain vigilant to the possibility of tax evasion when involved in what is ostensibly lawful planning.
- 9.6 A member must never be knowingly involved in tax evasion although, of course, it is appropriate to act for a client who is rectifying his tax affairs. A member should always seek to persuade his client to comply with the law and should follow the advice in Chapter 5, including consideration of anti-money laundering obligations, if concerned about the activities of clients or third parties.
- 9.7 This is a complex and specialised area and a member should not undertake this type of work unless he has the relevant experience and knowledge or obtains specialist support. A member acting in any other capacity, for example, on a self-assessment enquiry, who becomes aware of behaviour which may be considered to be tax evasion should advise the client accordingly. For example:
- Whether the matter should be dealt with under CoP 9
  - Whether the matter should be dealt with under an HMRC disclosure facility (see Chapter 7)
  - The potential for significant tax-gearred penalties
  - The potential for HMRC to make public details of the client's misdemeanours.
- 9.8 A member should also seek to protect both himself and his clients and avoid any perception of involvement in tax evasion by, for example, ensuring that proper disclosure is made. If a member is aware of any confusion in the documentation, he should avoid misleading HMRC or creating any perception that HMRC is being misled.

**10. HMRC RULINGS AND CLEARANCES**

- 10.1 It is necessary that a 'taxpayer put[s] all his cards face upwards on the table'<sup>20</sup> if he is to be able to rely on a ruling or clearance provided by HMRC in response to a request from a taxpayer or his agent.
- 10.2 The member should, where relevant, indicate to HMRC that a fully considered ruling is sought and the use he, his employer, or his client intends to make of any ruling given. The taxpayer would need to indicate those areas where he is doubtful about the correct interpretation of the law or the application of HMRC practice.
- 10.3 A distinction should be drawn between situations where the client is seeking the ruling of HMRC pursuant to a statutory clearance procedure and those situations where the client is asking HMRC for a ruling on the tax treatment of a particular transaction. In the former case, the relevant information for an effective clearance will normally be prescribed by the statute creating the clearance procedure. In the latter case it may be necessary to go into more detail concerning the application of the law to the transaction.
- 10.4 If it is clear that HMRC has made an error in a ruling, a member should follow the guidance in Chapter 5 Irregularities.
- 10.5 If there is no apparent error in HMRC's ruling but it is more favourable than expected, the member should check the quality of his submission to ensure that the full details of the specific transaction on which he sought HMRC's ruling were adequately and accurately presented and take corrective action if necessary.
- 10.6 If a member obtains an adverse ruling with which he disagrees, he may advise the client to consider asking HMRC to reconsider, or to appeal/ask for an internal review under the relevant procedure, if any.
- 10.7 If HMRC wishes to withdraw a ruling given in relation to a previous period, whether generally or specifically to the client, there may be a remedy in Judicial Review. In this event, the member should seek legal advice as soon as possible as to the applicable time limits for such proceedings. It may also be possible to make an application to the Adjudicator or to the Parliamentary Ombudsman.
- 10.8 If the facts and circumstances change after HMRC has given its ruling, the member should notify HMRC to ascertain whether and how the alteration affects the ruling.

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<sup>20</sup> The meaning of 'full disclosure' was considered by Bingham LJ (as he then was) in *R v IRC ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569E- – G and endorsed by the House of Lords (Lord Jauncey of Tullichettle) in *R v IRC ex parte Matrix Securities Limited* [1994] STC 272. See also HMRC's guidance on its clearance and approvals service at [Seeking clearance or approval for a transaction - Detailed guidance - GOV.UK](#)



## **11. OTHER INTERACTIONS WITH HMRC**

### **Principles of engagement**

- 11.1 This Chapter addresses interactions with HMRC which are not in the context of a client's tax affairs.
- 11.2 A member must respect any request by HMRC for confidentiality until such time as HMRC lifts this requirement or the matter comes into the public arena. If in doubt the member should clarify whether confidentiality is required and the scope and duration of the requirement for confidentiality with his HMRC contact on the matter.
- 11.3 HMRC has confirmed that representatives of a professional body (the body) may share confidential information with senior people from the body, in order to keep the body informed.

### **General interactions**

- 11.4 If HMRC approaches a member for a general meeting the member is recommended to find out the nature and purpose of the meeting before engaging in further discussion or agreeing to meet:
- If the meeting relates to one or more specific clients the member should refer to Chapter 5.
  - If the purpose of the meeting is a general discussion about the firm's portfolio and approach at a generic level the member should refer to 11.5 and 11.6 below.
  - Any approach to a member by HMRC in relation to the legality or professional competence of his work should be regarded as a serious matter and the advice in 11.7 – 11.10 should be followed.

HMRC has given assurances that the reason and purpose for any meeting will be made clear at the outset.

- 11.5 Whatever the nature of HMRC's enquiries a member must not disclose confidential client information without the prior consent of the client, unless there is a legal duty to do so. HMRC has extensive statutory powers to obtain information.
- 11.6 If it appears that the proposed meeting will be a general discussion, the member may decide to meet HMRC, but is under no professional obligation to do so. The member should ensure that any information provided to HMRC is accurate. He should caveat any general explanations to make it clear if there are or may be exceptions. If in doubt the member should check the facts before responding. If the member has doubts about the relevance of any questions asked by HMRC then clarification should be sought. If at any stage the meeting appears to be evolving into a challenge to the legality of activities at the member's firm or the professional competence of the firm, the member should end the meeting and then refer to the guidance in paragraphs 11.7 to 11.10 below.

### **Targeted interactions**

- 11.7 Any approach to a member by HMRC in relation to the legality or professional competence of the member or his firm's work should be regarded as a serious matter. HMRC has specialist units, part of whose brief is to monitor and investigate the standards of tax advisers and consider civil or criminal proceedings against individuals or, less commonly, firms.
- 11.8 Where the situation in 11.7 applies, a member should consider taking specialist and/or legal advice at an early stage. The member should also consider asking the specialist to

conduct the discussions with HMRC, since a member may not always be the best advocate in his own cause.

- 11.9 A member should consider whether he has an obligation to notify his professional indemnity insurer about any HMRC investigation and also whether any costs incurred by him in the course of the investigation may be covered by any investigation costs insurance held by him.
- 11.10 A member should also consider whether he has an obligation to notify his professional body at any stage.

### **Consultations**

- 11.11 Government makes policy. However, many members will be involved in providing input through the consultation process. Consultations can take many forms including formal public consultation processes, research process, HMRC open days for interested parties, consultation discussions with HMRC and participation in HMRC working groups. A member's objective is to apply his technical expertise and practical and commercial experience to provide input to assist government in making informed choices about policy options and in achieving their policy objectives in an effective manner without unintended consequences.
- 11.12 A member who actively participates in such consultations should:
- Be open and transparent.
  - Make clear the basis upon which he is providing input, e.g. whether it is on behalf of his representative body or firm or, for example, on behalf of a group of clients in a particular industry.
  - Draw to the attention of HMRC any unintended consequences he has identified in the legislation at the time that he is making representations on that legislation.
  - Not disclose client / taxpayer-specific information as part of his involvement in the consultation process without, first, gaining express clearance.
  - Not disclose matters relating to his employer / sponsoring organisation outside of their terms of reference without, first, gaining express clearance.

### **Secondments**

- 11.13 A member may be seconded or be responsible for arranging a secondment to HMRC. References to HMRC in this Chapter include any other body, department or organisation to which a member may be seconded. The terms and conditions of any secondment should be agreed in writing.
- 11.14 The secondee should be mindful that, for the duration of the secondment, his role and obligation is to serve the interests of HMRC. Care should be taken to minimise any actual or perceived conflict of interest between HMRC and the seconding organisation. Confidentiality must be maintained in both directions: the member must keep client affairs private from HMRC and must similarly not use knowledge gained at HMRC to help clients or colleagues.
- 11.15 A secondee should act openly and transparently in providing input based upon his experience outside HMRC. During his secondment, the secondee has a professional duty to draw attention to any unintended consequences he identifies, when reviewing draft legislation.

- 11.16 Upon completion of the secondment the secondee and his employer should be alert to the risk of being seen to have taken undue advantage of information gained whilst working for HMRC. Factual statements about the individual having undertaken a secondment, particularly in a CV, would be unexceptional, but active promotion of knowledge and experience gained may be inappropriate. This would particularly be the case if the member advertised their knowledge in a way that implied they can now solve problems based on 'inside knowledge'. To minimise the risks of misunderstanding, the secondee should agree with their HMRC supervisor what can and cannot be said or discussed at the conclusion of the secondment. In any case he should avoid involvement in the affairs of any taxpayer he was aware of or dealt with at HMRC for a significant period.